No. 3896

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation), WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT and L. M. DOHERTY,
Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,
Appellees.

CLOSING BRIEF OF APPELLEES.

WILLIAM DENMAN,
WM. F. ROSE,
Solicitors for Appellees.

HORATIO ALLING,
Of Counsel.

SUMMARY OF POINTS.

1. The lower court acted within its jurisdiction in appointing the receiver and the receiver's possession and his rights as to compensation and expenses were the same as they would have been had his appointment not been held to have been an erroneous exercise of jurisdiction.

2. The question as to which of the parties should ultimately be charged with the receivership costs having been expressly postponed by the lower court, cannot be considered or determined on this appeal.

3. With that question deferred for future action, the "first instance" provision made for receivership expenses from the fund was justifiable and warranted.

4. The allowances made in the first three orders for receiver's compensation, traveling expense and counsel fees, being for official as contra-distinguished from administrative expense, are not subject to review on this appeal for the reason that such orders were each and all appealable, and the time for appeal had passed before the order was made from which this appeal was taken.

5. The purely administrative expense represented by the salaries of the manager and bookkeeper were expenses of the business and not of the receivership and were properly currently paid from current receipts. They may not even be properly included in taxable receivership costs.

6. Litigation expense and the receiver's official expense including compensation and counsel fees being the debts of the court growing out of the court's custody of the property, were properly paid in the "first instance" from the fund.

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In their reply brief appellants have entirely ignored the single reviewable question involved in this appeal, namely, did the lower court err in making a "first instance" provision for the receiver's compensation and counsel fees out of the fund in his hands. The following excerpts from the memorandum opinion of the lower court which preceded and directed the order appealed from will show that the provision was purely temporary, and that it was the only matter passed upon by the lower court:

> "There is no exception taken to the correctness or propriety of any particular item of the

receiver's account but the objection really is to the items of that account being charged or allowed against the fund administered, the contention being that they should under the circumstances of the case be charged to the plaintiff who procured the appointment of the receiver. But that question will more properly arise on a motion to tax the costs upon the entry of the final decree. * * * This being so, it (the court) has authority to provide for his (the receiver's) compensation either out of the fund administered, or at the hands of the party procuring his appointment. * * * Nor does it necessarily follow that because his appointment was erroneously made the expense and compensation may not be directed to be paid out of the fund coming into his hands. That depends upon the circumstances of the case. As suggested, however, the question does not properly arise at this stage of the proceedings. But that the court may direct the payment of the receiver's accounts out of the funds in his hands *in the first instance* (italics ours) there is likewise no question." (Trans. vol. II, pp. 501-503.)

After referring to the able and exceptionally efficient administration of the receiver the opinion concludes thus:

"Certainly the laborer is worthy of his hire. Who ultimately is to pay that hire may be reserved until it properly arises. The exceptions are overruled and an order may be drawn approving and confirming the report of the receiver and providing for the compensation of himself and his counsel; and that *for the present* ((italics ours) such compensation to be paid out of the balance of the fund left in his hands for the purpose." (Trans. vol. II, pp. 503, 504.)

The balance referred to was the amount retained by the receiver upon returning the property and fund to the corporation

> "to satisfy any balance of commissions and expenses of the receivership, including attorney's fees, which may be allowed him in his final account"

under order of court made on motion of R. T. Harding, solicitor for appellants. (Trans. vol. II, pp. 356-357.)

The order that followed and from which this appeal is prosecuted, approved and confirmed the fourth and final report and account of the receiver, directed that out of the fund the receiver pay himself $2262.34 as compensation and a like amount to his counsel, and that he be discharged and his bondsmen exonerated. The order then concludes thus:

> "It is further ordered that all other questions raised by defendants on this hearing be and they are hereby postponed for determination until the hearing on the final decree herein." (Trans. vol. II, pp. 504, 506.)

Whatever shall be held in regard to the scope of this review, as to whether it includes only the items contained in the fourth and final report, or, as well, all items excepted to in the three prior reports, it stands admitted by appellants that all of the items excepted to represented reasonable charges for services actually rendered and expenses actually incurred.

Notwithstanding appellants' exceptions wherein it was insisted that the items specified should be

charged against the complainants, and notwithstanding their assignment of error in that they were not so charged in and by the order appealed from, that question is not reviewable on this appeal for the reason that it was by the lower court expressly reserved for future consideration and determination. Apart from that question, the only objection urged against the order appealed from is that the receiver's compensation and counsel fees were directed to be paid in the "first instance" out of the balance in his hands provided for that express purpose. As above stated, that is the single reviewable question on this appeal.

On this sole issue appellants have advanced but one pertinent contention, namely, that the lower court was without jurisdiction to appoint the receiver, and that as a consequence the order was void and the receiver's possession of the property and fund no better than that of a trespasser, and that, therefore, the property and fund should be restored intact and without deduction on account of the expense of an administration that was without lawful warrant.

JURISDICTION.

It will be conceded that the lower court had jurisdiction of both the parties and the subject matter of the suit. The general jurisdiction thus obtained in an equitable action includes as a necessary incident to its effectual exercise the power to apply any

and all recognized provisional and auxiliary remedies. In 15 *Corpus Juris,* p. 810, sec. 108 it is said:

> "A grant of jurisdiction implies the necessary and usual incidental powers essential to effectuate it, and every regularly constituted court has power to do all things that are reasonably necessary for the administration of justice, within the scope of its jurisdiction, and the enforcement of its judgments and mandates. * * * A court's power to apply a remedy being co-extensive with its jurisdiction over the subject matter; * * * So demands, matters, or questions ancillary or incidental to or growing out of the main action, and which also come within the above principles, may be taken cognizance of by the court and determined, for such jurisdiction is in aid of its authority over the principal matter."

The appointment of a receiver is a recognized provisional or auxiliary remedy in an equity suit.

> "The appointment of a receiver is one of the prerogatives of a court of equity, exercised in aid of its jurisdiction, in order to enable it to accomplish, as far as practicable, complete justice between the parties before it."
>
> 34 *Cyc.* 17.

> "The matter of the appointment of a receiver is the subject of equitable jurisdiction, to be exercised in proper cases in any cause of which the court, as a court of equity, has jurisdiction."
>
> 34 *Cyc.* 101.

The power to appoint a receiver inheres in the court's general jurisdiction of a cause. It exists independently of any appeal to it in a given cause.

It is a resident power as much when passive as when called into play. When invoked by an application for appointment it functions either favorably or unfavorably to the applicant. But the power is not born of the application; it is not called into being, as contended by appellants, by the presentation of a so-called "proper case". It is merely aroused to action by the case presented. Being thus appealed to it becomes an active discretion—the power of decision in play. To say that the power to decide depends upon the correctness of the decision is no more ridiculous than to say, as contended by appellants, that the jurisdiction to appoint a receiver depends upon appellate approval of the appointment.

> "Jurisdiction of a question is the lawful power to enter upon the consideration of it, and to decide it. It is not limited to making correct decisions. It necessarily includes the power to decide an issue wrong as well as right."
>
> *Ex parte Moran* (C. C. A., Eighth Cir.) 144 Fed. 594, 604.

> "Jurisdiction is a matter of power, and covers wrong as well as right decisions."
>
> *Lamar v. U. S.,* 240 U. S. 60; 60 L. Ed. 526;
>
> *Fauntleroy v. Lum.,* 210 U. S. 230; 52 L. Ed. 1039;
>
> *Burnet v. Desmornes, y Alvarez,* 226 U. S. 145; 57 L. Ed. 159.

> "A court's jurisdiction is its authority to hear and determine a cause. Its decision in a particular case has nothing to do with its juris-

diction of the cause. Decision is a sequence of jurisdiction not its source."

Hazelwood Dock Co. v. Palmer, 228 Fed. 325, 326.

In *U. S. v. Ness* (C. C. A., Eighth Cir.) 230 Fed. 950, 953, it is said:

"The test of jurisdiction is not right decision, but the right to enter upon the inquiry and make some decision. Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to the question and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action or ground for relief, but it includes every issue within the scope of the general power vested in the court to deal with the abstract question. It is not limited to making correct decisions. It empowers the court to determine every issue of law and fact within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong." (Citing)

Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 316, 318; 8 C. C. A. 635;

Insley v. U. S., 150 U. S. 512; 14 Sup. Ct. 158; 37 L. Ed. 1163;

Cornett v. Williams, 20 Wall. 226; 22 L. Ed. 254;

Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552; 8 Sup. Ct. 217; 31 L. Ed. 202;

In re Sawyer, 124 U. S. 200, 221; 8 Sup. Ct. 482; 31 L. Ed. 402;

Skillern v. May's Ex'rs, 6 Cranch 267; 3 L. Ed. 220;

McCormick v. Sullivant, 10 Wheat 192; 6 L. Ed. 300;

King v. McAndrews, 111 Fed. 860, 863; 50 C. C. A. 29.

Appellants insist that the presence of a "proper case" is a necessary predicate of jurisdiction to appoint a receiver, but therein they fail to distinguish between jurisdiction and its exercise. The determination as to whether a "proper case" is presented implies a decision of the questions of law and fact involved and such decision represents the exercise of jurisdiction. Jurisdiction, on the other hand, is the authority to so decide.

In the instant case the lower court decided that a proper case was presented for the appointment of a receiver. That decision involved a finding that the facts were such as to warrant the application of the provisional remedy of receivership. As a result of a *de novo* review in this court, it was held that the lower court erred in its findings of fact. It was found below that the majority stockholders were acting in fraud of the rights of the minority and of the corporation. This court held that the evidence did not warrant that finding. Clearly the error found inhered in the exercise and not in the absence of jurisdiction. The essence of the reversal of the order appointing a receiver was the holding by this court that the lower court's determination of the matter was wrong, not that there was a lack of

power to make any determination as to the appointment of a receiver.

It being thus apparent that the lower court had jurisdiction or power to appoint the receiver, it follows, quite irrespective of whether it erred in so doing, that the order of appointment was not void and that the receiver's possession of the property and of the fund that accumulated in his hands was lawful.

As above stated, lack of jurisdiction to appoint the receiver is the only contention advanced by appellants in either their opening or their reply briefs tending to show lack of authority or lawful warrant for purely "first instance" provision from the fund for receivership costs, compensation and counsel fees. The only other contention of appellants is that a consideration of the equities of the case should require the taxation of all receivership costs to the complainants. That question is not here reviewable by reason of its postponement by the lower court, nor does the contention that all receivership costs should, in view of the equities of the case, be taxed to complainants, have any bearing on the question of the propriety of a purely "first instance" provision for such costs from the fund.

FIRST INSTANCE ALLOWANCE FROM FUND.

The receiver, being an officer of the court, his possession of the property and fund became the court's possession and the receiver's expenses in

connection with the administration of the fund became the liabilities of the court itself.

> "A receiver appointed to preserve a fund or property *pendente lite,* derives his authority from the act of the court appointing him; the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled."
>
> 34 *Cyc.* 185;
>
> *Quincy, etc. v. Humphreys,* 145 U. S. 82; 36 L. Ed. 632;
>
> *Union Bank v. Kansas City Bank,* 136 U. S. 223; 34 L. Ed. 34.

Property in the possession of a receiver is in *custodia legis;* the receiver's possession is the possession of the court for the benefit of the party ultimately entitled to it.

> *Atlantic Trust Co. v. Chapman,* 208 U. S. 360; 52 L. Ed. 528;
>
> *Ex parte Tyler,* 149 U. S. 164; 37 L. Ed. 689;
>
> *Thompson v. Phoenix Ins. Co.,* 136 U. S. 237; 34 L. Ed. 408;
>
> *Wiswall v. Sampson,* 14 How. 52; 14 L. Ed. 322.

In the *Atlantic Trust Co. v. Chapman,* 208 U. S. 360; 52 L. Ed. 528, 533 it is said:

> "It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by his appointment and the course and practice of the court. * * * When a court exercising juris-

> diction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court. The court itself holds and administers the estate through the receiver as its officer."

At page 535 (L. Ed.) it is further said:

> "A receiver as soon as he is appointed and qualifies, comes, as we have said, under the sole direction of the court. The contracts he makes or the engagements into which he enters from time to time under the order of the court, are in a substantial sense, the contracts and engagements of the court. The liabilities which he incurs are liabilities chargeable upon the property under the control and in possession of the court, and not the liabilities of the parties. They have no authority over him and cannot control his acts."

The general rule is that a receiver's compensation and the expenses necessarily incurred by him in preserving and caring for the property under the order of a court of competent jurisdiction are a charge upon and should be paid out of the fund or property in his hands, although the party procuring the appointment is ultimately unsuccessful.

Atlantic Trust Co. v. Chapman, 208 U. S. 360; 52 L. Ed. 528;

Clark v. Brown, 119 Fed. 130;

Elk Fork Oil Co. v. Foster, 99 Fed. 495;

Burden Central Sugar-Refining Co. v. Ferris Sugar Mfg. Co., 87 Fed. 810;

Ferguson v. Dent, 46 Fed. 88;

Blair v. St. Louis R. Co., 20 Fed. 351.

The same rule has been applied in the following cases as to receiver's counsel fees:

Penn. Life Ins. Co. v. Jacksonville R. Co., 93 Fed. 60;

Sowles v. Nat. Union Bank, 82 Fed. 139;

Petersburg Sav. etc. Co. v. Dillatorre, 70 Fed. 643;

Louisville, etc. R. Co. v. Wilson, 138 U. S. 501; 34 L. Ed. 1023.

> "The proper method of procedure is to have his (the receiver's) compensation fixed by the court, to be allowed out of the assets in his hands and the amount thus determined to be due him may be taxed as costs in the action."
>
> *High on Receivers,* (Fourth Ed.) Sec. 796.

This general rule of making the fund bear the court expense of the court's administration of the property is subject to certain exceptions. If the court was without jurisdiction to appoint the receiver in the first instance, the fund must be restored intact. Again if the complainant fails in the main action, and no benefit has accrued to the defendant from the receivership, especially where there is evidence of bad faith in procuring it, the costs of the receivership may be ultimately taxed to complainant. Also in cases where the complainant fails in the action, should it appear that the defendant has materially benefited by the receivership, in the ultimate taxation of receivership costs they are sometimes paid from the fund and sometimes apportioned between the parties.

But in none of the cases where the costs of the receivership are ultimately taxed in whole or in part to the complainant is it held that a "first instance" allowance from the fund may not properly be made in harmony with the recognized principle that receivership expenses are court liabilities arising out of the court's custody of the property. In all cases, however, the matter of ultimate taxation of receiver's compensation and expenses is governed by the universally recognized principle that such compensation and expense are part of the costs of the action, and, like other costs in an equitable proceeding are to be assessed or taxed in accordance with the principles of equity and on equitable grounds. They are none the less taxable costs because they are non-statutory and require judicial ascertainment.

2 *Tardy's Smith on Receivers,* pp. 1726, 1754.

But we have not here to consider the question as to what would be an equitable ultimate taxation of the receivership costs in this case inasmuch as that matter was by the order appealed from expressly deferred until the entry of the final decree. That the court may make a provisional allowance out of the fund without losing its power to place the burden ultimately on the party who ought to bear it, was held in

Cutter v. Pollock, 4 N. D. 205; 59 N. W. 1062; 50 Am. St. R. 644; 25 L. R. A. 377;

Nutter v. Brown, 58 W. V. 237; 52 S. E. 88; 1 L. R. A. (N. S.) 1083.

It is urged by appellants that the receivership being an independent matter severable from the action proper, upon its termination by the discharge of the receiver, it was obligatory upon the court to make a full and final disposition of the matter by taxing the receivership costs to one or the other of the parties. It would be a complete answer to say that the lower court in and by the order appealed from did not do so, but expressly deferred action as to that matter, and, that being so, the court's failure to act cannot be reached by this appeal. But no authority has been cited in support of the proposition and it is not made to appear other than by appellants' assertion that the court was under any obligation to so finally dispose of the matter of taxation of receivership costs at the time of ordering the receiver's discharge. On the other hand there are abundant authorities to the effect that the court has inherent power to place itself in a position upon relinquishing possession of the property to enforce its orders with respect to expenditures made in connection with the receivership.

34 *Cyc.* 480;

Josyln v. Athens Coach etc. Co., 43 Minn. 534; 46 N. W. 77;

La Junta etc. Canal Co. v. Hess, 31 Colo. 1; 71 Pac. 415;

Knickerbocker v. Kindley etc. Co., 172 Ill. 535; 50 N. E. 330.

A condition at once impractical and unfair would result from a denial of the court's right to make

"first instance" provision from the fund for the receiver's compensation and expense pending ultimate taxation of such amounts as costs in the case. It would follow of necessity in such case that the receiver would have to serve without compensation until the entry of the final decree and even then take his chance of being able to realize the amount due. Furthermore, as to expenses other than receiver's compensation, due to strangers to the suit, pending final decree, the amounts would have to remain unpaid or be advanced by the receiver himself.

In the instant case should it be held that the "first instance" allowances made from the fund were not authorized, and that the order appealed from should, therefore, be reversed, the receiver would immediately be under obligation to restore to the fund the amounts so allowed him including not only his compensation, but that of his counsel and as well, over $27,000 paid on account of litigation and administrative expenses. If it is appellants' position that no such restitution should be made, then their objection to the order appealed from is simply and solely as to the failure of the lower court to finally tax the receivership costs to the complainants; a matter which clearly is not reviewable on this appeal in view of its express postponement until final decree.

SCOPE OF REVIEW.

There were four orders made covering receiver's compensation. They appear in the transcript as follows: the first at page 262 of Vol. I; the second at page 294 of Vol. II; the third at page 314 of Vol. II; and the fourth at page 504 of Vol. II.

These four orders were made in connection with the approval and allowance of the four reports and accounts filed by the receiver. The exceptions and objections filed by appellants to the receiver's fourth and final report include certain exceptions and objections to the first three orders made as to receiver's compensation. All four orders directed the allowances for compensation to be paid out of the fund in the receiver's hands. It is here contended by appellees that each of the first three orders that preceded the fourth and final order were appealable and therefore not reviewable on this appeal.

The first was made December 11, 1918, and covered the period from February 23, 1918 to December 31, 1918. The second was made January 6, 1920, and covered the full calendar year of 1919. The third was made December 4, 1920 and covered the full calendar year of 1920. The fourth was made September 29, 1921 and covered the period from January 1, 1921 to September 29, 1921, the date of the receiver's discharge. The time for

appeal from each of the first three orders had expired long before the date of the fourth order.

Each of the first three orders was for a definite specified period. Each amounted to an independent judicial determination as to what was a reasonable sum to be allowed and as to its payment from the fund. In the nature of things none of these orders were the subject of review by the trial court upon the consideration of the fourth and final report. They were each a final order covering a definite period of service. The amounts allowed had been paid from the fund as ordered, and so said orders had been fully executed. All three were closed incidents when the fourth and final report was filed. The mere fact that the court still retained jurisdiction of the parties and subject matter and of the receiver and the fund did not make them interlocutory in nature or detract from their full finality.

The authorities are unanimous in holding that an order fixing the receiver's compensation and directing its payment from funds in his hands is an order of such final character as to warrant an appeal therefrom by any party interested in the estate, since such an order withdraws the amount specified from the fund in the custody of the court and thereby affects the substantial rights of the parties.

2 *Tardy's Smith on Receivers,* p. 2155, sec. 807;

Ruggles v. Patton, 143 Fed. 312; 74 C. C. A. 450;

Penn Co. v. Philadelphia, 266 Fed. 1;
Edwards v. Western Land & Power Co., 27 Cal. App. 724; 151 Pac. 16;
Forester v. Boston & Butte M. Con. Copper Co., 30 Mont. 181; 76 Pac. 2;
Thompson v. Denton, 95 Oh. St. 333; 116 N. E. 452;
Kilpatrick v. Horton, 15 Wyo. 501; 89 P. 1035;
Battery Park Bank v. Western Carolina Bank, 126 N. C. 531; 36 S. E. 39;
Union Nat. Bank v. Mills, 103 Wis. 39; 79 N. W. 20.

The amounts allowed and directed to be paid to the receiver from the fund as compensation for the calendar years 1918, 1919, 1920 in and by the first three orders were as follows:

First order for fractional year 1918	$ 4,270.76
Second order for year 1919	5,000.00
Third order for year 1920	5,000.00
	$14,270.76

No exception is taken by appellants as to the reasonableness of these allowances, it being objected merely that they should not have been paid from the fund. If such orders were not final the receiver would face the alternative of serving without compensation up to the time of his discharge, or accept-

ing the periodic payments at the risk of ultimately being required to repay them. Neither alternative would be equitable in view of the nature of his office and his neutral position as between the parties at interest. Fairness to the court's custodian should require that parties deeming themselves prejudicially affected by such an order should press their objection by a timely appeal or be debarred from later challenge.

Such an order is held to be a final adjudication upon a collateral matter arising out of the action, and, therefore, appealable.

1 *Clark on Receivers,* p. 746, sec. 682;
Grant v. Sup. Ct., 106 Cal. 324; 39 Pac. 604;
Grant v. Los Angeles & Pac. R. Co., 116 Cal. 71;
Capital City v. Anderson, 138 Ga. 667; 75 S. E. 1040;
Thompson v. Huron Lum. Co., 5 Wash. 531; 32 Pac. 536;
People v. Brooklyn Bank, 126 N. Y. Supp. 155;
Burroughs v. Merrifield, 243 Ill. 362; 90 N. E. 750;
Hanover Ins. Co. v. Germania Ins. Co., 46 Hun. 308.

This rule manifestly applies equally to the receiver's personal expenses incurred in the discharge of his official duty. Items of this character included

in the first three reports to which exceptions were taken are as follows:

First Report—	
Premium on receiver's bond	$ 50.00
Traveling expenses (vol. II, p. 362)	579.25
	$629.25
Second Report—	
Premium on receiver's bond	$ 50.00
Traveling expenses (vol. II, p. 368)	546.56
	$596.56
Third Report—	
Premium on receiver's bond (vol. II, p. 373)	50.00
Total	$1275.81

This amount, together with the $14,270.76 allowed as compensation in the first three orders makes $15,546.57 of the items excepted to by appellants, which are clearly not reviewable on this appeal by reason of the appealability of the first three orders. Whatever may be said or held as to purely administrative expenses of the receivership such as necessarily inhere in the operation of the business, it is believed that no case can be found holding that orders directing the payment of receiver's compensation from the fund are not appealable.

There is every reason why the same rule of finality and appealability should be applied to orders allowing receiver's counsel fees and directing their payment from the fund. In the case of *Heinze v. Butte & Boston, etc. Min. Co.*, 129 Fed.

337; 64 C. C. A. 15, counsel fees were joined with ordinary administrative expenses of the receivership and the order covering both was held to be interlocutory; but there would seem to be the best of reasons for distinguishing receiver's counsel fees from expenses necessarily incident to the management and operation of the property entrusted to the receiver. They are intimately related to allowances for receiver's compensation. It is rarely the case that a receiver is an attorney, yet it is of the highest importance that in all his dealings with the trust estate, he should safeguard the legal rights of all parties to the controversy. To that end it is imperative that he be properly advised as to his powers and duties.

There are cogent reasons for differentiating receiver's charges that are purely *official* from those that are purely *administrative.* Official charges arise out of the office; administrative charges relate to the property itself, as an indispensable expense of operation. The latter are a natural and necessary lien upon the fund and their payment cannot be said to amount to *a deduction from the fund;* the former being over and above the expense that would have been necessary but for the receivership when paid from the fund are a clear *deduction from the fund.*

In *Ruggles v. Patton,* 143 Fed. 312, 313, it is said:

> "The test of the finality of a decree affecting either the conduct or the compensation of a receiver is not found in the mere fact as to

> whether the receivership is thereafter continued, but in the nature and character of the order itself. When Mr. Patton was ordered to pay to himself out of the funds in his hands as custodian for the court, the sum of $20,000 for his service for 1904, that sum of money was just as absolutely withdrawn from the custody of the court as if he had been ordered to pay it to a third person. The fact that he was then the court's receiver, and that he continued to be the court's receiver, gave the court no more authority to call back a fund which he was directed to pay to himself in the absence of a reservation to that effect, than it could exercise over any other party obtaining funds through an order of the court. * * * We think that the direction that the receiver should pay to himself $20,000 for a specific service already rendered was a complete withdrawal of that part of the funds from the court's possession."

Considered in the light of their extra-administrative character it would seem clear that the receiver's counsel fees paid from the fund would be as much *a deduction from the fund,* within the reasoning of the Ruggles case, as the receiver's compensation itself, and in view of the fact that the cases are uniform in holding that an order directing receiver's compensation paid out of the fund is appealable, it would seem to follow that the same rule should apply to orders relating to receiver's counsel fees.

The *Heinze* case involved an order covering both purely administrative expenses and receiver's counsel fees. There was no attempt in that case to dis-

tinguish the two and the mixed order appealed from was held to be interlocutory. That case seems to stand alone in so holding as to counsel fees. Under the reasoning of the later cases which recognize that extra-administrative charges paid from the fund represent *a deduction from the fund,* whereas purely administrative charges cannot be said to be a deduction, it would seem necessarily to follow that an order for the payment of receiver's counsel fees from the fund was of such final character as to give to the parties interested in the fund the right of appeal.

If it should be said and held that the first three orders allowing counsel fees and directing payment from the fund were appealable then they are not reviewable on this appeal. The first three orders as to counsel fees were as follows:

December 11, 1918 for fractional year 1918	$4,270.76
January 6, 1920 for year 1919	5,000.00
December 4, 1920 for year 1920	5,000.00
	$14,270.76

The items excepted to, but not reviewable on this appeal because covered by appealable orders made prior to the order appealed from then aggregate:

Receiver's compensation	$14,270.76
Receiver's traveling and bond expenses	1,275.81
Receiver's counsel fees	14,270.76
Total	$29,817.33

This leaves as reviewable items among those excepted to by appellants the following:

First Report—	
F. C. Handy, manager at mine, 10 months @ $450 per month	$ 4,500.00
Receiver's bookkeeper at various rates, 10 months	988.33
Court costs	70.00
	$ 5,558.33
Second Report—	
F. C. Handy	$5,400.00
Bookkeeper	1,225.00
Haskins & Sells' audit	3,679.40
Fees of Master in Chancery	2,500.00
	$12,804.40
Third Report—	
F. C. Handy	$ 5,400.00
Bookkeeper	1,500.00
	$ 6,900.00
Fourth Report—	
F. C. Handy	$2,100.00
Bookkeeper	500.00
Receiver's compensation	2,262.34
Receiver's counsel fees	2,262.34
Total	$ 7,124.68
Total	$32,387.41

Classified and consolidated the reviewable items excepted to are:

Receiver's Administrative Expense—	
F. C. Handy	$17,400.00
Bookeeper	4,213.33
	$21,613.33

Litigation Expense—	
Court costs	$ 70.00
Expense of audit	3,679.40
Master fees	2,500.00
	$ 6,249.40
Receiver's Official Expense—	
Receiver's compensation	$ 2,262.34
Receiver's counsel fees	2,262.34
	$ 4,524.68
Total	$32,387.41

As to the first classification, namely, receiver's administrative expense: A manager at the mine was as necessary under the receiver as before. The salary allowed for Mr. Handy as manager ($450 per month) was the same as previously paid by the corporation to E. M. Gleim as superintendent. The bookkeeper in San Francisco also was necessary to the management and operation of the property and business. The company had employed one before the receivership. The receiver retained the same man until he became incapacitated by illness.

It is impossible to see why these allowances for manager and bookkeeper, both admittedly necessary to the operation of the property and business, were any more objectionable than the wages of the miners or any other necessary element of operating expense.

In the instant case the San Francisco administrative expense at the time of the appointment of the

receiver and for a long period prior thereto was (Vol. I, pp. 123-125):

B. S. Noyes, President	$125 a month
W. S. Noyes, Vice Pres. & Gen. Man.	375 " "
J. W. F. Peat, Secy.	270 " "
	$770

Under the receivership the corresponding San Francisco expenses in the 39 months of receivership were (Vol. II, pp. 506, 527, 528):

W. B. Maling, Receiver	$16,533.10
F. R. Wehe, Attorney	16,533.10
Bookkeeper	4,213.33
	$37,279.53

an average of $955.88 per month. This is an average increase of only $185.88 a month in San Francisco, or $7249.32 during the entire receivership. The only further excess in costs of the receiver's administration was in the retaining of E. M. Gleim, together with F. C. Handy, for the first nine months, at $450 a month, or $4050. (Vol. I, p. 232.) For the remainder of the receivership, Mr. Handy's salary of $450 merely offset the same sum that had been paid Gleim by the defendants prior to the receivership.

This total of $11,299.32 is all that can possibly be construed as excess in costs of the receivership over the prior management; and this excess is much more than made up to the corporation by savings effected by the efficient management under the receiver,

which savings in the year 1918 alone were $14,038.70 (Vol. I, 269), representing the difference between the receiver's operating cost and that of the prior corporate management.

No objection is raised to the fact that the receiver operated the mine, and the fact that such operation for three years resulted in the accumulation of over $500,000 net profits sufficiently indicates the wisdom of that course. If the mine was to be operated and the employment of a manager and bookkeeper were necessary to such operations, their payment had to be provided for. The receiver paid them currently out of the fund and reported such payments, and the reports were approved. How else were they to be paid?

It is insisted by appellees that this classification of the receiver's expense of operation is not even a proper item to be included in the ultimate taxation of receivership costs to the parties. It was a legitimate expense of the business itself as contra-distinguished from the receivership.

The next classification, namely litigation expense, includes court costs, expense of audit and master's fees. The Haskins & Sells' audit covers an examination of the books and records of the corporation for a number of years, and was made with the consent and on the stipulation of the attorneys for the respective parties. The purpose of the audit primarily was to discover the true situation as bearing upon certain allegations of the complaint relative to the mismanagement of the company's affairs.

A secondary purpose served by certain elements of the audits covered by the charge was the assistance to the receiver in the preparation of annual income tax returns. (Vol. I, pp. 181, 281.) The item of $2500 for fees of the Master in Chancery covered services rendered by the Master under an order of reference made by the court of certain issues left open by the interlocutory decree. The appeal from the interlocutory decree did not operate by way of supersedeas, and the inquiry under the reference continued during the pendency of the appeal. The fees charged arose in connection with that inquiry.

All three of the elements of litigation expense, including court costs, cost of audit and Master's fees, are, of course, in their nature proper taxable costs in the case and when the final decree comes to be entered, they will doubtless be included in such taxation. Here, as well as in respect to the receiver's compensation and counsel fees, the allowance from the fund was purely temporary and in aid of the advance of the litigation to its conclusion. At most it amounts to a mere advance from the fund in the court's custody to cover charges that would in the nature of things be included in the final taxation of costs. Furthermore, in so far as the audit was necessary to the receiver's administration, it became an element of official and non-administrative expense which, under the contention above advanced was appealable, and therefore, not here reviewable. As to the $2500 for Master's fees, appellants, at page 104 of their reply brief, concede

that the order directing its payment from the fund was appealable; therefore, it is not here reviewable.

The only other items excepted to within the scope of review are the receiver's compensation and counsel fees for the frational year 1921, covered by the order approving and confirming the fourth and final report. The propriety of the "first instance" payment of these items from the fund has been already fully discussed.

EQUITABLE CONSIDERATIONS.

We have already touched on this subject. (pp. 32, 34, first brief for appellees.) This suit was brought by two minority stockholders on behalf of the corporation against the majority who dominated its Board of Directors, and who naturally had refused to bring a suit against themselves. As a result of the suit the corporation secures section 5, a valuable piece of mining ground, the title to which stood in the name of W. S. Noyes, the principal defendant. A further result of the suit was the cancellation of a lease given by Noyes to the corporation, by which cancellation the company benefited by receiving *all* instead of a part of the net profits from section 5, since the decree of the trial court of February 18, 1918, and affirmed by this court. The company had not declared a dividend since 1905, but by reason of the suit and the receivership, $638,000 net profits accumulated in a little over three years, and upon the discharge of the

receiver was turned over to the corporation. Throughout the litigation both the individual defendants and, by reason of their control, the company itself denied under oath that the corporation had any right to section 5, or the cancellation of the lease, and persistently objected to the granting of the relief prayed, or any relief to the corporation. This phase of the matter has already been discussed in the brief for appellees (pp. 25-27), and in the receiver's printed argument (pp. 4-8).

It is interesting to note the position taken by the appellants in their briefs on the former appeal in which we find their exceptions noted numbered XLIII, XLIV and XLV, in which they aver that the court erred in finding that section 5 belonged to the Presidio Mining Company, or that Noyes was a trustee. (Opening brief for appellants on appeal, No. 3253, pages 42, 54.) Also in their exceptions L and XLIX appellants assert that the court erred in ordering section 5 transferred to the Presidio Mining Company. (Same brief, pages 45, 57.) Also exceptions LX and LIX appellants aver that the court erred in making a decree in favor of plaintiffs and against defendants. (Same brief, pages 48, 60.)

Again in their argument it is asserted that Noyes claimed section 5 as his individual property; that it was the main matter for consideration in the case; that herein lies the heart of this case; that Noyes had a right to make the best bargain he could in contracting with the corporation and to insist that

the terms of the bargain should be lived up to; that he was dealing at arms length with it; that the corporation was without any right whatsoever in section 5; that it had no right, title, estate, interest or claim in section 5. (See same brief, pages 70, 71, 73, 206, 207, 210, 242, 313 and 314.)

Again in their closing brief on the original appeal, No. 3253, it is urged at page 199 thereof, that a decree of this Circuit Court of Appeals be entered, reversing the decree of the trial court.

Again in appellants' brief on rehearing, No. 3253, page 31, we find the assertion that the bill of complaint must be dismissed; page 43, the appeal should be dismissed on grounds of res judicata and at page 317 we find the following:

> "We submit that the decrees appealed from should be reversed."

This consistent attitude of all the appellants controlling the corporation, indicates that the desire to retain section 5 for W. S. Noyes cannot be reconciled with their present statement that Noyes had always offered it to the corporation and was ready to turn the said section over to the company on the payment of its purchase price.

It is contended by the appellants that the suit was unnecessary in view of this court's findings that W. S. Noyes at all times *desired* that the corporation should have section 5. It might be pointed out in reply that he and his brother at all times dominated the Board of Directors and had he so *desired,* the means of realizing that desire was always at hand.

The fact that the transfer *was not* made to the corporation, nor any deed by Noyes ever tendered, sufficiently indicates that the desire was not controlling, to say the least, and his resistance to the suit and the according of the relief awarded is conclusive evidence that the suit was necessary. Appellants insist that because of the modification on appeal of the interlocutory decree of the lower court, the entire cost burden should be placed upon the complainants, notwithstanding the fact that the modifying decree of this court affirmed the trial court's decree awarding Section 5 to the corporation. That this court did not so regard the underlying equities of the case is manifest from the concluding clause of its opinion on rehearing, which is

> "The plaintiffs and defendants will each pay their own costs in this court."

In their reply brief on this appeal, appellants savagely attack the good faith of the plaintiffs in bringing the suit, and particularly in seeking the appointment of the receiver. Yet it is nowhere made to appear that the plaintiffs sought or could have obtained any advantage by the suit or the receivership, save as stockholders of the corporation. And anything which they as stockholders might gain by the suit would be equally advantageous to all other stockholders, including the majority stockholders named as individual defendants. Appellants assert that the equities of the case require that not only the purely official expense of the receivership, but as well, over $20,000 of purely administrative ex-

pense, represented by the salaries of the manager and bookkeeper, should be taxed against the two minority stockholders, who at their own risk and expense initiated this suit which has resulted in the recovery of Section 5 for the corporation. This appeal appears to be more of an effort on the part of appellants to obtain such a judgment for costs against the appellees, as might result in freezing them out of the corporation through execution and levy on appellees' stockholdings in this company, and thereby secure such an absolute control of the corporate stockholdings that no minority representation can ever be obtained on the Board of Directors at any time in the future, rather than a desire to seek in good faith a recovery on behalf of the corporation.

The complainants believed and so alleged, that the individual defendants had been guilty of gross fraud upon the corporation. The lower court and one member of this court found to that effect. Two members of this court disagreed as to that finding. Surely the accusation could not have been so utterly unfounded as to warrant the imputation by appellants of bad faith to the complainants. Moreover, it stands admitted that Osborn was an embezzler; that the Noyes Brothers used their knowledge of the embezzlement to force him to surrender his stock as the price of their continued concealment of the crime. (Record No. 3253, pp. 271, 754, 819; Record No. 3896, pp. 40, 41, 43, 58, 59, 60.) Having in this manner secured control of the corporation

they used that control to serve their own individual ends and interests. Notwithstanding these facts, these appellants, including the embezzler, now seek to penalize the complainants.

With these admissions in the record, it ill becomes appellants to accuse the complainants of bad faith in instituting an action so largely beneficial to the corporation in its result, and in connection with which they could in no wise hope to profit save in common with all other stockholders, the appellants themselves included.

Appellants object to the statement that the corporation was benefited by the receivership and insist that the half million accumulation of net profits in the receiver's hands resulted from the operation of the Pittman Act, whereby the price of silver was appreciated. The statement also is made "that the cash resources of the company increased, not because of this receivership, but in spite of it." (Reply brief for Appellants, page 35.) In their argument, however, we find no mention of the fact that the receiver increased wages during the first year of his receivership, which amounted to $1727.50 per month. (Record No. 3896, Vol. I, pp. 230, 257, 260.) During the second year of the receivership a second wage increase was granted, amounting to between $1500 and $2000 per month. (Same record, p. 288.) This was for mine and mill employees' wage increase alone, and does not include wartime increased cost of materials and supplies, consisting of an advance of from 100 to 200

per cent over pre-war time prices. Again by referring to the tabulation of monthly costs of operation (same record, pp. 266-269) we find that during the first year's operation by the receiver his said operations during this one year alone were $14,038.70 less than the operating costs of the corporation by the appellants for the preceding year, and that too, notwithstanding the increased cost of labor and supplies. From all of which it would appear that the profit realized by the receiver resulted in large part from the greater efficiency, economy and honesty of his management, as compared with that which preceded it. During this one year this saving was greater than the difference of $11,299.32, which sum comprehends the entire difference between the receivership expense for three and one-quarter years, and the regular operating expense under the management of the displaced appellants. In addition to these figures we also refer to the tabulation of $42,620.33 interest earned on invested profits realized during the receivership, as indicated on page 30, brief for appellees.

Appellants' criticism on pages 1 to 4 of their reply brief, relative to the "re-entry" of Colonel Carl A. Martin is eminently unfair. The reading of the petition of the minority stockholders (Record 3253, Vol. V, pp. 1491-1511) clearly explains the so-called "re-entry" of Colonel Martin. The petition alleges (page 1494):

> "Reading the opinion he finds that he is not a party to the action. Reading the record he

finds that he is. He therefore joins in this petition for the purpose of again becoming a party to the action, if he ever was, or for the purpose of becoming a party for the first time, if he never has been a party."

Said petition states the facts concerning the minority shareholders' active interest in this litigation, and that they had at all times supported the action of complainants, Overton and Martin; that said Overton holds the proxies of the above named stockholders to be used for his election as a director of the company (pp. 1497-1499); that they have contributed $15,000 to a fund to apply on the expense of the litigation. (pp. 1501, 1502.) These facts conclusively prove the interest of the majority of the minority stockholders and their desire to support the actions of the complainants below and appellees herein. No decision on said petition was ever rendered by this court, as we have pointed out on page 1 of our opening brief.*

Dated, San Francisco,
January 20, 1923.

Respectfully submitted,

WILLIAM DENMAN,
WM. F. ROSE,
Solicitors for Appellees.

HORATIO ALLING,
Of Counsel.

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*Instead of "New Trans." 1491-1511, the above reference should have been No. 3253, Vol. V, pages 1491-1511.